PUBLIC FINANCE BHD

v.

ZAINAL OSMAN

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[SUIT NO: MT3-22-1615-1998]
30 AUGUST 2001

CIVIL PROCEDURE: *Action - Cause of action - Writ action to recover loan - Whether a charge action begun by writ - Whether action based wholly and exclusively on breach of loan agreement - Judgment in default - Whether leave required before judgment could be entered - Setting aside judgment - Whether there was defence on merits - Rules of the High Court 1980 O. 83 r. 1(1), O. 83 r. 4(1)*

The plaintiff granted a loan to the defendant for the purchase of a certain property. The loan was secured by three forms of security, namely, a loan agreement, a charge over the said property and a letter of guarantee. Subsequently, upon obtaining the architect's certificates in respect of the property, the plaintiff disbursed the loan to the developer and demanded payment from the defendant. The defendant defaulted and the plaintiff filed the writ action herein claiming recovery of RM443,773.51 and interest thereon. The writ action, as shown by the plaintiff's statement of claim, was based on the defendant's breach of the loan agreement. In any case, the defendant did not file any memorandum of appearance and judgment in default of appearance was entered for the plaintiff.

The defendant applied to set aside the judgment, but the application was dismissed by the learned registrar. The defendant appealed and argued before the learned judge that: (i) the writ action was a charge action, and hence leave was required under O. 83 r. 4(1) Rules of the High Court 1980 ('RHC') before judgment could be entered for the plaintiff; and (ii) there was defence on the merits as (a) there was no justification for the plaintiff to have released the loan pursuant to the sale and purchase agreement (b) the plaintiff was negligent in so releasing the loan; and (c) the plaintiff was not entitled to recover payment under the terms of the charge instrument. The issues that arose were: (i) whether O. 83 r. 4(1) RHC applied, and hence (ii) whether the action here was a charge action begun by writ or an action based on the defendant's contractual breach of the loan agreement.

Held:

[1] The essence of the plaintiff's claim is wholly and exclusively based on the loan agreement, being one of three forms of security that the plaintiff may elect to enforce. Undoubtedly the writ action arose out of the defendant's defaults in the repayment of the loan sum. It was anchored on the loan agreement, independent of the other two forms of security, namely the charge and the letter of guarantee. The writ action not being a charge action, O. 83 r. 4(1) RHC did not apply, and hence no leave of the court was required to enter judgment. (p 649 d-i)

[2] In an application to set aside a regular judgment in default of appearance, the burden is on the defendant to show a defence on the merits. (p 650 b-c)

[3] The defendant had proceeded on the basis that this action was a charge action under O. 83 RHC and hence affirmed his affidavit based on that ground alone and not on the loan agreement which formed the substratum of the plaintiff's claim. Without any doubt, there was nothing in the affidavit to show any defence on the merits in relation to the plaintiff's cause of action founded on the loan agreement. Since there was no allegation in the defendant's affidavit to rebut the plaintiff's case based on the loan agreement, the plaintiff's allegations of fact in that respect must stand admitted by the defendant. (p 650 h)

[3a] The defendant's affidavit, consequently, disclosed no defence on the merits and no triable or arguable issue. Hence, the application to set aside the judgment was properly dismissed by the learned registrar. (p 651 a-b)

[4] Even if the court were to consider the defendant's arguments, the fact remains that the defendant has not shown any defence on the merits. Architects have the special professional skill and competence to certify the state of the building and the plaintiff is perfectly entitled to rely on their certificates. (p 652 a-b)

[Appeal dismissed.]

Case(s) referred to:

Evans v. Bartlam [1937] AC 473 ***(refd)***

Government Of Malaysia v. Sim Soe Hoe [1990] 1 CLJ 279; [1990] 2 CLJ (Rep) 72 ***(refd)***

Kwong Yik Bank Bhd v. Sa'adiah Mastan [1994] 3 CLJ 781 ***(refd)***

Lew Yoke Leng & Ors v. Syarikat Kar King Sdn Bhd [2000] 4 CLJ 184 ***(dist)***

Mbf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam [2000] 2 CLJ 230 ***(dist)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(foll)***
Public Finance Bhd v. Soo Siong [1988] 3 MLJ 352 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 83 rr. 1(1)(a), 4(1)

For the defendant - James Dominic Culaz; M/s Hari & Assocs
For the plaintiff - CL Tan; M/s Soo Thien Ming & Nashrah

Reported by WA Sharif

JUDGMENT

Low Hop Bing J:

Background And Appeal

This is a writ action commenced by the plaintiff against the defendant to recover the sum of RM443,773.51 as at 4 September 1998, interest at 13.85% (ie, 1.5% p.a. above the base lending rate of 12.35% at monthly rests on the balance outstanding from 5 September 1998 until full realisation) and costs.

The writ together with the statement of claim had been duly served on the defendant on 10 April 1999. The defendant did not file any memorandum of appearance and so judgment in default of appearance ("the judgment") was entered for the plaintiff on 21 April 1999. The judgment was served on the defendant on 9 June 1999. The defendant on 1 July 1999 filed an application by way of summons in chambers in encl. (8) to set aside the judgment and to file the statement of defence. Enclosure (8) was heard on 12 May 2000 by the learned senior assistant registrar who had dismissed it on the same day.

Against the registrar's aforesaid decision, the defendant had on 16 May 2000 filed this appeal in encl. (13). In this appeal, for ease of reference, I shall refer to the parties as plaintiff and defendant respectively.

Submission For Defendant

Encik James Dominic Culaz, learned counsel for the defendant, submitted that this is a charge action and so leave is required under O. 83 r. 4(1) of the Rules of the High Court 1980 to enter the judgment. He said that the decision in *Public Finance Bhd v. Soo Hock Siong* [1988] 3 MLJ 352 is distinguishable.

He proceeded to contend that there is defence on the merits in that the plaintiff before releasing the progress payments under cl. 1.08 of the fixed term loan agreement ("loan agreement") has failed to be satisfied that the state of the building to be erected thereon justified the advance and that the architect's certificate was produced. He argued that the repayment of the loan commences only upon the principal sum having been disbursed in full in accordance with the loan agreement and the charge documents. He added that the plaintiff, by

failing to ensure that the progress payments are justified by the state of the building as required under the said cl. 1.08, should not be allowed to demand repayment of the loan.

In his view, there was no connection of water and electricity, in which event the defendant was unable to utilise the building to generate any form of income to make the relevant repayment and he relied on *Lew Yoke Leng & Ors v. Syarikat Kar King Sdn Bhd* [2000] 4 CLJ 184 in support of this proposition.

He alleged that the plaintiff has been negligent in releasing the progress payments without studying the architect's certificate and cited *Mbf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam* [2000] 2 CLJ 230 as the supporting authority.

Plaintiff's Response

Cik LT Tan, learned counsel for the plaintiff, submitted that this writ is founded on the loan agreement and that there is no dispute that the parties herein are bound by their respective obligations. She added that there is also no dispute that the principal sum has been disbursed in accordance with the loan agreement and so the defendant's obligation to repay arises thereafter. She referred to the defendant's affidavit in encl. (7) cl. 9 wherein the defendant admitted that he needed more time to fulfil his obligation to repay the loan. She said that there is a clear event of default by the defendant and that it is a writ action based on the defendant's contractual breach of the loan agreement. She added that it is therefore not a charge action, in which case, no leave is necessary to enter the judgment.

On the defence of merits, plaintiff's learned counsel replied that there is no express clause in the loan agreement which imposes an obligation on the plaintiff to inspect physically the state of the building to ensure water and electricity supply to the building before the release of the loan sum, and that it is not within the plaintiff's expertise to make sure that delivery of vacant possession was effected. It was contended for the plaintiff that the plaintiff could release progress payments so long as there are some forms of certification by an architect and that the plaintiff could not be faulted for the absence of water and electricity supply to the property in question, otherwise it would amount to insertion of clauses which were not in the agreement. Plaintiff's learned counsel said that the defendant's remedy, if any, is against the architect or the developer. Hence, she concluded that there are no merits in the defence.

Decision Of The Court

Does O. 83 r. 4(1) Apply?

The action filed by the plaintiff in this case is plainly a writ action. The question that has to be determined by the court is whether O. 83 r. 4(1) of

the Rules of the High Court 1980 applies here. Order 83 r. 4(1) provides as follows:

> Notwithstanding anything in Order 13 or Order 19, in a charge action begun by writ judgment in default of appearance ... shall not be entered except with the leave of the Court.

The answer to the aforesaid question would depend on the conclusion as to whether the action herein is a charge action begun by writ. Under O. 83 r. 1(1), a charge action may be begun by a writ or an originating summons. A charge action is an action in which there is a claim for, *inter alia*, payment of moneys secured by the charge: O. 83 r. 1(1)(a). In the context of the instant case, to constitute a charge action, the cause of action must be founded on the charge documents registered under the National Land Code 1965. If a cause of action is not based on a charge, but merely on a breach of e.g. a loan agreement, then it would not be a charge action.

The cause of action herein is founded on the averments contained in the plaintiff's statement of claim. Para 3 thereof avers that by the loan agreement, the plaintiff agreed to extend and the defendant agreed to accept a fixed term loan, on the terms and conditions expressed therein, including the interest and monthly instalment payment of RM4,969 for 144 months, which the defendant has defaulted in payment as averred in para. 6 thereof. After serving the necessary notices of demand due to the defendant's repeated defaults, the present writ action was commenced against the defendant. The essence of the plaintiff's claim is wholly and exclusively based on the loan agreement which is one of the three forms of security which the plaintiff may elect to enforce, the other two being a charge on the property in question registered under the National Land Code 1965 while the third form of security is constituted by a letter of guarantee given by Credit Guarantee Corporation Malaysia Berhad: see cl. 1.02 with the caption "Security For The Fixed Loan" in the loan agreement. This writ action undoubtedly arises out of the defendant's defaults in the repayment of the loan sum and is anchored on the loan agreement, independent of the other two aforesaid forms of security *viz*. charge and letter of guarantee. That being the case, it is my specific finding that this is a writ action commenced by the plaintiff by reason of the contractual breach by the defendant of the loan agreement. There is no averment in the plaintiff's statement of claim in relation to the enforcement of plaintiff's right pursuant to the charge. Therefore it is, in my view, not a charge action and so the provisions of O. 83 r. 4(1) have no application. Hence, no leave of the court is required to enter the judgment. I hold that the judgment is a regular judgment. Support for my view may be found in *Public Finance Bhd v. Soo Hock Siong, supra*, where the facts are almost on all fours with those in the present action, except that judgment in default of defence was entered for the

plaintiff there while in the instant case, judgment in default of appearance was entered for the plaintiff. Anuar J (later CJ(M)) held that the plaintiff's action being based on the plaintiff's letter of offer granting and the defendant's acceptance of a loan, is a simple action to recover a debt, to which O. 83 r. 4(1) does not apply.

Defence On Merits

In a application to set aside a regular judgment in default of appearance, the burden is on the defendant to show a defence on the merits: *Kwong Yik Bank Bhd v. Sa'adiah Bte Mastan* [1994] 3 CLJ 781; *Evans v. Bartlam* [1937] AC 473. It is therefore incumbent on the defendant to show in his affidavit that he has a defence on the merits. The defendant's affidavit in support is to be found in encl. (7) wherein para. 3 refers to the sale and purchase agreement which he has executed with the developer to purchase the property in question, while para. 4 specifies the mode of progress payment under the sale and purchase agreement. The loan for the purchase of the said property was obtained from the plaintiff (para 5). Paras 6 and 7 relate to the annexure to the charge. It is to be noted that these 2 paras do not refer to or rely on the loan agreement which is the basis of the plaintiffs cause of action herein. Para 8 alleges that the failure on the part of the developer to connect water and electricity supply to the property, as a result of which the defendant states in para. 9 that he was unable to commence his business and he needed more time to repay the loan. In para. 10, he says that he has lodged a complaint with the Menteri Besar of Negeri Sembilan and also Bank Negara. He was advised by his lawyer that the plaintiff should not have made progress payments pursuant to the sale and purchase agreement and so the plaintiff is not able to recover the repayment of the loan pursuant to the charge (para. 11) and not, be it noted, the loan agreement. He alleges in para. 12 that the plaintiff has been negligent in doing so. In para. 13, the defendant argues that this action is premature and does not reflect the true intention of the parties as expressed in the annexure to the charge. On these allegations of fact, he urges the court to hold that he has a defence on the merits.

After a very careful analysis of each and every allegation of fact as deposed to in the plaintiffs affidavit, it is my specific finding that the defendant has proceeded on the basis that this action is a charge action under O. 83 and hence it is not surprising that he has affirmed his affidavit based on that ground alone and not the loan agreement which is the substratum of the plaintiffs claim. Without any doubt whatsoever, there is nothing in the affidavit to show any defence on the merits in relation to the plaintiff's cause of action founded on the loan agreement. Since there was no allegation in the defendant's affidavit to rebut the plaintiff's case based on the loan agreement, the plaintiffs allegations of fact in that respect are deemed to have been admitted by the defendant: *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995]

1 CLJ 609, where the Court of Appeal held, *inter alia*, that "in evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of the opponent to contradict it is usually treated as an admission by him of the fact so asserted." Therefore, where, as in this case, the defendant's affidavit discloses no defence on the merits or for that matter no triable or arguable issue, the application to set aside a judgment in default should be dismissed: *Government Of Malaysia v. Sim Soe Hoe* [1990] 1 CLJ 279; [1990] 2 CLJ (Rep) 72. In the circumstances, I am of the view that the learned registrar has properly exercised his discretion in dismissing the defendant's application in encl. (8) with costs. I therefore hereby uphold and affirm that decision and accordingly dismiss this appeal in encl. (13) with costs.

By way of an exercise of extra caution, in the event that I have erred in my conclusion above, I shall now proceed to consider the argument and authorities cited by learned counsel for the defendant.

First, the plaintiffs release of the loan pursuant to the architect's certificate under the sale and purchase agreement entered into between the defendant as purchaser and the developer as vendor. Clause 1.08 of the loan agreement reads as follows

Release Of Loan

1.08. The loan is to be released progressively as and when the Lender is satisfied that the state of the Building to be erected thereon justified the advances and upon production of the necessary Architect's Certificate certifying the state of completion and after the legal documents are duly completed and the difference between the purchase price and the Loan is firstly paid by the Borrower.

As a matter of fact, the progress payments were disbursed or released by the plaintiff pursuant to each and every certificate issued by the relevant architect who has certified the state of the building to be erected thereon. There is no evidence of any non-compliance by the plaintiff with the said cl. 1.08.

Lew Yoke Leng & 2 Ors v. Syarikat Kar King Sdn Bhd, supra, relied on by the defendant in relation to the connection of water and electricity to the building in question, did not determine the issue concerning the obligation or liability of a banker to release the progress payment under the loan agreement in the instant case. James Foong, J clearly identified the issue in that case as one which "centres on the interpretation of cl. 20 in the S&P agreement of whether vacant possession with electricity supply to the house means electricity connected to the house or sufficient when power supply only reached the electrical sub-station in the housing estate where the house is." I fail to see how the defendant's learned counsel is able to derive any support therefrom for his contention as I have stated above.

The next and final point raised for the defendant is the alleged negligence in releasing the progress payments without studying the architect's certificates. The loan agreement does not appear to contain any obligation which requires the plaintiff to go behind the architect's certificate. Architects have the special professional skill and competence to certify the state of the building and the plaintiff is perfectly entitled to rely on these certificates issued by architects in order to justify the disbursements of the relevant progress payments, and that is precisely what the plaintiff has done in this case.

Mbf Property Service Sdn Bhd & Anor v. Balasubramaniam K Arumugam, supra, is not a case which deals with the alleged negligence of a banker in releasing the relevant progress payments. It was an appeal concerning the construction of an agreement entered into between the first appellant and the respondent. The respondent there took out an originating summons against the appellants asking for a declaration that he need not make any payments to the second appellant (the end financer) until the issuance of the certificate of fitness for occupation. This application was allowed by the High Court and the Court of Appeal. That case does not concern any allegation of negligence on the part of the financier and in my view, cannot lend any support to the defendant's argument. As a matter of fact, the architect's certificate dated 9 December 1997 exh. SA2 in encl. (12) in the instant case expressly states that the defendant was given vacant possession with water and electricity supply ready for connection to the said building. In the ultimate analysis, there can be no doubt in my mind that the defendant has not shown any defence on the merits and so from whatever angle one looks at the entire case before me, the result is the same and the defendant's appeal still fails.